

**COURT OF APPEALS
DECISION
DATED AND RELEASED**

May 23, 1996

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See § 808.10 and RULE 809.62, STATS.

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

No. 95-3486-CR

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

THOMAS L. LECK,

Defendant-Appellant.

APPEAL from a judgment of the circuit court for Dane County: STUART A. SCHWARTZ, Judge. *Affirmed.*

DYKMAN, J. This is a single-judge appeal decided pursuant to § 752.31(2)(c), STATS. Thomas L. Leck appeals from a judgment convicting him of one count of operating a motor vehicle while under the influence of an intoxicant (OMVWI), contrary to § 346.63(1)(a), STATS. Leck argues that his motion to suppress should have been granted because the police officer did not have probable cause to arrest him for this crime. We conclude that the officer had probable cause to arrest him for OMVWI and affirm.

BACKGROUND

At about 3:00 a.m., on July 23, 1994, Dane County Deputy Sheriff Linda Hilgers was dispatched to a home in the Town of Sun Prairie where a man who had been in a car accident had called for assistance. Upon arriving at the home, Thomas L. Leck answered the door and told Hilgers that he had been in an accident and was hurt. Hilgers noticed that as Leck walked, he winced with pain. Hilgers also noticed a strong to moderate odor of intoxicants on Leck's breath, that his eyes were bloodshot and watery, and that his speech was slurred. Leck told Hilgers that as he was driving home from a bar at about 1:30, he lost control of his car at a curve in the road and the car rolled over onto its roof.

Another police officer arrived at Leck's home and told Hilgers about the accident. He reported to her that Leck's car had left the road and was found about 451 feet away from the road, on its roof. The curve in the road where Leck lost control of his car was only about eight-tenths of a mile from the bar.

Hilgers asked Leck if he had been drinking and Leck responded that he had had a couple of beers at the bar. Leck never stated that he had been drinking at home and Hilgers did not notice any evidence of drinking in his living and dining rooms.

Hilgers asked Leck if he knew the alphabet and to recite it, not sing it. Leck recited the alphabet, got the letters mixed up, and sang it. Hilgers testified that after Leck sang the alphabet, he said "T, U, V" again, then "W, X, Y, and N," and then stopped. As he was reciting the alphabet, his speech was slurred. Hilgers concluded that Leck was confused and not thinking clearly. Based upon this information, Hilgers concluded that Leck had been operating a motor vehicle while under the influence of an intoxicant and placed him under arrest.

The trial court concluded that based upon the information known to Hilgers, there was probable cause to arrest Leck for OMVWI. Leck pleaded no contest to OMVWI and was convicted. Leck appeals.

DISCUSSION

Whether probable cause exists to support an arrest requires the application of a constitutional standard to undisputed facts, which we review *de novo*. *State v. Riddle*, 192 Wis.2d 470, 475, 531 N.W.2d 408, 410 (Ct. App. 1995). The test is one of probabilities:

"Probable cause exists where the totality of the circumstances within the arresting officer's knowledge at the time of the arrest would lead a reasonable police officer to believe that the defendant probably committed a crime."

While the circumstances within the arresting officer's knowledge need not be sufficient to make the defendant's guilt more probable than not, the defendant's guilt must be more than a mere possibility for the arrest to be constitutional. Further, in determining whether probable cause existed, we do not look to the officer's subjective beliefs, but apply an objective standard based upon the circumstances as they were at the time of the arrest.

Id. at 476, 531 N.W.2d at 410 (citations and quoted source omitted). Probable cause does not require proof beyond a reasonable doubt or even that guilt is more likely than not. *State v. Babbitt*, 188 Wis.2d 349, 357, 525 N.W.2d 102, 104 (Ct. App. 1994).

Leck argues that there was no probable cause to support his arrest because the time that passed between the accident and his arrest raised the possibility that Leck had been drinking at home. He contends that Hilgers should have determined whether Leck had been drinking in his home before making the arrest and therefore Hilgers's observations of Leck cannot be used as factors to support a probable cause determination.

We agree that other reasons may explain Hilgers's observations of Leck. Some time passed between the time of the accident and when Hilgers

was called to Leck's home, and Leck may have done more drinking in the interim. Some of Hilgers's observations may also be attributable to the injuries Leck sustained in the car accident. But a third reasonable inference was that Leck had been operating a motor vehicle while under the influence of an intoxicant. When faced with reasonable competing inferences, an officer may rely on the one justifying an arrest. *State v. Tompkins*, 144 Wis.2d 116, 125, 423 N.W.2d 823, 827 (1988). Here, based upon the nature of the car accident, the fact that Leck had been driving home from a bar where he had had a few drinks, the moderate to strong odor of intoxicants on his breath, his bloodshot and watery eyes, slurred speech, confused thinking and inability to state the alphabet, it was reasonable for Hilgers to conclude that Leck had probably been operating a motor vehicle while under the influence of an intoxicant.

By the Court. – Judgment affirmed.

Not recommended for publication in the official reports. See RULE 809.23(1)(b)4, STATS.